In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-545

GENERAL GMC TRUCKS, INC.,
Petitioner,

vs.

GENERAL MOTORS CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinions below are set forth correctly in the Petition (Pet. 1-2). The decision of the Supreme Court of Georgia has now been reported at 239 Ga. 373, 237 S.E. 2d 194 (1977).

JURISDICTION

The jurisdiction of this Court in this case is accurately stated in the Petition (Pet. 2).

QUESTIONS PRESENTED

(1) Whether the Supreme Court of Georgia was correct in holding that the restriction on new dealers by existing dealers for the retail sale of motor vehicles within Georgia contained in §84-6610(f)(10) of the Act creates an undue burden on interstate commerce?

(2) Whether §84-6610(f)(10) of the Act, which restricts competition between dealers within Georgia by allowing existing dealers to exclude new dealers, is in conflict with the Sherman Antitrust Act and therefore invalid under the Supremacy Clause?*

(3) Whether the Georgia Franchise Practices Commission (the "Commission"), which is required by §84-6604(a) of the Act to be composed of a majority of existing dealers, can be a fair and impartial tribunal in deciding legal and economic disputes between dealers and manufacturers consistent with fundamental due process requirements?*

STATUTES INVOLVED

Provisions Relevant to the First Question Presented:

The Commerce Clause of the United States Constitution, U. S. Const. art. I, §8, and §84-6610(f)(10) of the Georgia Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act of 1976, 1976 Ga. Laws 1440, Ga. Code Ann. §84-6601 (the "Act"), are accurately set forth in the Petition (Pet. 3).

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*If this Court grants the petition, then this Court should consider these issues as additional grounds for affirming (without modifying) the judgment of the Supreme Court of Georgia. *Langnes* v. *Green*, 282 U. S. 531, 539 (1931); *United States* v. *Nobles*, 422 U. S. 225, 241-42 n. 16 (1975).

Provisions Relevant to the Second Question Presented:

The Supremacy Clause of the United States Constitution provides in part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U. S. Const. art. VI, cl. 2.

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1-7 (1974), provide in part as follows:

> §1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .
>
> §2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . .

Provisions Relevant to the Third Question Presented:

The Fourteenth Amendment to the United States Constitution provides in part as follows: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U. S. Const. amend. XIV, §1.

Section 84-6604(a) of the Act, 1976 Ga. Laws 1444-45, Ga. Code Ann. §84-6604(a), provides in part as follows:

> There is hereby created the Georgia Franchise Practices Commission to be composed of nine members . . . [F]ive of the members shall be franchised dealers (three of whom must be dealers who sell automobiles) who have been actively engaged in business as such in the State of Georgia for at least five years. . . Four members of the commission shall not be dealers or employees of a dealer.

STATEMENT OF THE CASE

This action began in September 1975, when Petitioner General GMC Trucks, Inc. filed an administrative complaint with the Commission seeking to invalidate the franchise contract between the GMC Truck and Coach Division of General Motors Corporation ("GMC") and Trade City GMC, Inc. ("Trade City") for the sale to Trade City of heavy-duty 9500-series trucks manufactured by GMC (RGFPC 245).[1] Trade City is an established truck dealership in competition with Petitioner. In its administrative complaint, Petitioner alleged that it held an existing franchise for the 9500-series truck, and that under §84-6610(f)(10) of the Act the Petitioner alleged that it had the right to stop GMC from granting a similar franchise for the 9500-series truck to Trade City or any other dealer in the Petitioner's "community or territory."

It should be noted that the existing franchise agreement between Petitioner and GMC was a *non-exclusive* franchise; that is, that it expressly provided that GMC could at any time establish additional dealerships to purchase and market trucks manufactured by GMC. Until 1975, Petitioner was not only franchised to purchase from

1. GMC adopts the designations of the various portions of the record used by Petitioner.

GMC and market light and medium duty trucks manufactured by GMC, but also was the only franchised GMC 9500-series truck dealer in the Atlanta metropolitan area or for a surrounding area of 75 to 100 miles of its location in Fulton County.

Trade City is an independent truck dealership in Cobb County that has had since 1967 a franchise agreement with GMC that authorizes Trade City to purchase from GMC and market light and medium duty trucks manufactured by GMC. On October 9, 1975, Trade City and GMC entered into a new franchise agreement authorizing Trade City also to purchase from GMC and to market the full line of trucks manufactured by GMC, including the heavy-duty 9500-series trucks.

The Petitioner relied upon §84-6610(f)(10) which purportedly allowed the Commission to invalidate the granting of a new or additional franchise agreement within the "community or territory" of the existing dealer unless the manufacturer could prove that the existing dealer was inadequately representing that manufacturer in the community or territory. GMC and Trade City filed constitutional objections to the proceeding on various grounds, including that this provision of the Act violated the Commerce Clause and Supremacy Clause of the United States Constitution.

In February 1976, the matter proceeded to a hearing before the Commission. Section 84-6604(a) of the Act requires the Commission to have nine members, five of whom must be dealers. In this case, it was shown that three of the members of the Commission have truck dealerships located within Petitioner's "community or territory" (as determined by the Commission) and in direct competition with the proposed franchisee, Trade City, in the sale of light, medium and heavy duty trucks (RGFPC

84-91). GMC and Trade City also filed constitutional objections on the basis that the statutory makeup of the Commission (i.e. majority of existing dealers) was impermissibly biased and did not comport with the concepts of due process of the Fourteenth Amendment to the United States Constitution.

After GMC and Trade City's constitutional objections were overruled the matter proceeded on the factual issues set forth in §84-6610(f)(10). The evidence showed that Trade City had an excellent sales and service record in Cobb County. In 1971, in an effort to expand its business, Trade City requested GMC to grant it a franchise for a full line of GMC trucks, including the 9500-series. In preparation for the grant of this full line franchise, Trade City spent approximately $350,000 to expand its service facilities, acquire inventory of spare parts for the 9500-series and train mechanics to service the 9500-series, and to increase its capital (T. 89-92, 101, 112).

The evidence at the hearing further showed that Trade City was located twenty-one miles from the Petitioner in a different county and in a different trade area. GMC offered evidence to prove that GMC's market penetration for heavy-duty trucks in the Trade City area was low as compared to other areas of the country. The Petitioner admitted that it preferred not to sell trucks to "non-fleet" customers; that is, customers who bought fewer than ten trucks. The evidence clearly reflected that there was an ample market in the Trade City area for a new 9500-series truck franchise (T. 127-32). Trade City's sales and service abilities were not questioned; nor was its financial ability to sell and service the additional heavy-duty line.

Of particular import for the constitutional issues raised herein are the unequivocal admissions on the part

of the Petitioner that the reason it had filed its administrative complaint was in order to exclude Trade City from competition within the Petitioner's marketing area. The president of Petitioner testified that "when General Motors' dealers or any heavy-duty dealers are added in a metropolitan area, they immediately call on the same accounts, the profit potential is reduced or diminished" and that for that reason Trade City should not be allowed to sell the 9500-series truck (T. 236). Likewise, the chairman of the board of Petitioner agreed with the statement made by a member of the Commission that "the reason for you not liking to have another dealer here . . . is that he is going to be in competition to you and you are going to start cutting prices like we do on cars" (T. 317). It should be further noted in this regard that Petitioner has consistently taken the position throughout its briefs in the courts below that it does not deny that §84-6610(f)(10) is anticompetitive. (*See* Corrected Brief of Appellant in the Supreme Court of Georgia at 34.)

In May 1976, the Commission, ignoring the evidence, entered an order purporting to invalidate the franchise contract between GMC and Trade City for the 9500-series truck. The Commission ruled that the Petitioner's "community or territory" was a 37-county area stretching from Alabama to South Carolina. Under this ruling, GMC could not award a franchise for the 9500-series truck to Trade City or any other dealer in this area.

GMC and Trade City appealed the Commission's ruling to the Superior Court, which reversed the Commission's order. The Superior Court held that the restriction on additional franchises in §84-6610(f)(10) created an undue burden on interstate commerce and conflicted with the federal antitrust laws and was therefore unconstitutional. The Superior Court also held that the com-

position of the Commission made the Commission inherently biased, thus denying GMC and Trade City due process of law under the Fourteenth Amendment to the United States Constitution.

Petitioner appealed to the Supreme Court of Georgia, which affirmed the trial court on the ground that §84-6610(f)(10) burdened interstate commerce and was therefore unconstitutional. The Court stated, "We view this legislation . . . as purely anticompetitive. . . The Legislature may not use its power to protect a special group from competition." 239 Ga. at 377, 237 S.E. 2d at 197. The Court stated it was not necessary to reach the issue of whether §84-6610(f)(10) conflicts with the federal antitrust laws and would therefore be invalid under the Supremacy Clause. The Court ruled that the Commission was not inherently biased stating that GMC failed to rebut the presumption that state boards are fair and impartial.

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Georgia Correctly Held That the Restriction on Additional Dealers in §84-6610(f)(10) of the Act Unduly Burdens Interstate Commerce, and This Court Need Not Review That Decision.

The Supreme Court of Georgia held §84-6610(f)(10) unconstitutional under the Commerce Clause, U. S. Const. art. I, §8. The Court found that section burdened interstate commerce because its "practical effect" was to limit the number of retail outlets for 9500-series trucks in Georgia. 239 Ga. at 376, 237 S.E. 2d at 196. The Court also found that §84-6610(f)(10) was "purely anticompetitive" and thus served no legitimate public interest.

The Supreme Court of Georgia relied on the rule stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> [W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Petitioner admits that this rule is correct (Pet. 20-21), but challenges the Court's findings that §84-6610(f)(10) burdens interstate commerce and serves no legitimate public interest (Pet. 19, 23-24).

The facts of this case contradict Petitioner's argument. Here, Petitioner sought to exclude Trade City from the market for heavy-duty trucks and thus limit Trade City's ability to compete with the Petitioner and eliminate Trade City as a potential competitor for 9500-series trucks and generally. The Court below stated that limiting the number of retail outlets *is itself* an undue burden on interstate commerce. Petitioner cites no authority for its position that such a limitation does not unduly burden interstate commerce.

Apparently Petitioner claims that the restriction on new dealers in §84-6610(f)(10) does not burden interstate commerce because a manufacturer can attempt to persuade the Commission that it is not "adequately represented." In *Buck* v. *Kuykendall*, 267 U. S. 307 (1925), this Court struck down under the Commerce Clause a Washington statute requiring each common carrier to secure a certificate that the "public convenience and necessity" justified that carrier's operations. To secure this certificate the carrier had to offer evidence similar in many respects

to the evidence required from a manufacturer under §84-6610(f)(10). This Court stated:

> [The statute's] primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. *It prohibits such use to some persons while permitting it to others* for the same purpose and in the same manner.

276 U. S. at 315-16 (Emphasis supplied). The effect of the statute in *Buck* is identical to the effect of §84-6610(f)(10) here.

The decision of the Supreme Court of Georgia was correct and need not be reviewed by this Court.

II. The Decision of the Supreme Court of Georgia Is Not in Conflict With the Cases Cited by Petitioner.

Petitioner urges this Court to grant certiorari because the decision below is alleged to be in conflict with both state and federal decisions. An examination of the cases cited by Petitioner will demonstrate that this assertion is not correct. It should be noted that the only portion of the Act at issue is §84-6610(f)(10), which allows existing dealers to restrict new dealers (or new product lines) in their "community or territory." The cases cited by Petitioner differ both as to the factual subject at issue and the constitutional issues decided by the respective courts.

The decisions cited by Petitioner involve statutory provisions utterly different from §84-6610(f)(10). One of these cases deals with a statute prohibiting dealerships owned by manufacturers ("factory branches"), *Forest Home Dodge, Inc.* v. *Karns*, 138 N.W. 2d 214 (Wisc. 1965);

three deal with statutes prohibiting cancellation of a franchise without cause, *Willys Motors* v. *Northwest Kaiser-Willys*, 142 F. Supp. 469 (D. Minn. 1956); *Kuhl Motor Co.* v. *Ford Motor Co.*, 71 N.W. 2d 420 (Wis. 1955) and *Ruiz* v. *Economics Laboratory, Inc.*, 274 F. Supp. 14 (D. P.R. 1967); another deals with a statute prohibiting a manufacturer from forcing a dealer to accept motor vehicles or parts, *Ford Motor Co.* v. *Pace*, 335 S.W. 2d 360 (Tenn. 1960); and one deals with a statute requiring all motor vehicle dealers to be franchised by a manufacturer and allowing only motor vehicle dealers to advertise new vehicles for sale, *Louisiana Motor Vehicle Commission* v. *Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958). Thus, these cases clearly do not involve either the factual or constitutional issues of whether existing dealers should be able to restrict new dealers (of new product lines) from their existing "community or territory."

Only one of the cases cited by Petitioner, *Plantation Datsun, Inc.* v. *Calvin*, 275 So. 2d 26 (Fla. Dist. Ct. App. 1973) involved a restriction on new franchises similar to the restriction imposed by §84-6610(f)(10), and *Plantation Datsun, Inc.* neither raises the issue whether such a restriction on new franchises unduly burdens interstate commerce, nor discusses whether a state statute that eliminates competition can serve any legitimate public purpose.

Petitioner also claims that certain federal decisions have "tacitly" recognized the constitutionality of state statutes similar to §84-6610(f)(10) (Pet. 17-18).[2] None of

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2. *Buggs* v. *Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940); *E. L. Bowen and Company* v. *American Motors Sales Corp.*, 153 F. Supp. 42 (E.D. Va. 1957); *A.F.L. Motors Inc.* v. *Chrysler Motors Corp.*, 183 F. Supp. 56 (E.D. Wis. 1960); *Best Motor and Implement Co. Inc.* v. *Int'l Harvester Co.*, 252 F. 2d 278 (5th Cir. 1958); *B & T Distributors, Inc.* v. *Meister Brau, Inc.*, 459 F. 2d 29 (7th Cir. 1972); *Bushwick-Decatur Motors, Inc.* v. *Ford Motor Co.*, 116 F. 2d 675 (2nd Cir. 1940); and *Busam Motor Sales, Inc.* v. *Ford Motor Co.*, 104 F. Supp. 639 (S.D. Ohio 1952).

the federal cases cited by Petitioner involved statutes restricting the addition of new franchises. Furthermore, none of these cases raise the issue whether a state statute regulating motor vehicle franchises unduly burdens interstate commerce. These cases are simply irrelevant.

Section 84-6610(f)(10) of the Act is in conflict with the policy expressed by the federal Dealers' Day in Court Act.

Petitioner has attempted to imply throughout its petition that the provision of the Act allowing existing dealers to protest the addition of new dealers is consistent with the purpose and substance of the federal Dealers' Day in Court Act, 15 U.S.C. §1222 (1974). This is patently incorrect and misleading. The legislative history of this federal statute demonstrates that the restriction on additional dealers contained in the Georgia Act clearly *conflicts* with the federal Dealers' Day in Court Act. This was made clear by the House Judiciary Committee in its report on the bill that became the federal Dealers' Day in Court Act:

> The Committee emphasized that the Bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of the legislation* under the Bill. A manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment.

H. R. Rep. No. 2850, 84th Cong., 2d Sess., *reprinted in* [1956] U. S. Code Cong. & Ad. News 4596 (Emphasis supplied).

Petitioner cites the case of *Volkswagen Interamericana S.A.* v. *Rohlsen*, 360 F. 2d 437 (1st Cir. 1966), which arose under the federal Dealers' Day in Court Act. This case merely discusses the public purpose served by this federal statute and had absolutely nothing to do with the provision at issue here [§84-6610(f)(10)], which is in conflict with the stated purpose of the federal Dealers' Day in Court Act.

For these reasons, the decision of the Supreme Court of Georgia is not in conflict with the state and federal decisions cited by Petitioner, and this Court need not review the decision of the Supreme Court of Georgia.

III. The Restriction on Additional Dealers in §84-6610(f)(10) Conflicts With the Federal Antitrust Laws and Is Invalid Under the Supremacy Clause.

Although the Supreme Court of Georgia found it unnecessary to reach this issue, the judgment of that Court should be affirmed because the restriction on additional dealers contained in the Act in effect allows existing dealers horizontally to restrict existing competition and horizontally to prevent new competition. Any existing dealer, by bringing a complaint with the Commission can prohibit a new dealer from being established anywhere in the "community or territory" (as defined in the Act) of the existing dealer. In this case, the Commission found that the "community or territory" of Petitioner was a 37-county area of Georgia stretching from Alabama to South Carolina. Had the Commission's ruling been allowed to stand, Petitioner could prevent Trade City from strengthening its competitive position by adding the 9500-series truck line and at the same time prevent Trade City from becoming a competitor by handling the 9500-

series. Such horizontally-created restraints of trade have no purpose except stifling competition. *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F. 2d 1230 (3rd Cir. 1975). Indeed, in its brief to the Supreme Court of Georgia, Petitioner candidly admitted that §84-6610(f)(10) is in direct conflict with the federal antitrust laws. (*See* Corrected Brief of Appellant in the Supreme Court of Georgia at 34).

For these reasons, if this Court grants the Petition, then it should affirm the decision of the Supreme Court of Georgia on the ground that §84-6610(f)(10) is invalid under the Supremacy Clause.

IV. The Commission, Which Under §84-6604(a) of the Act Is Required to Be Dominated by Dealers, Is Not a Fair and Impartial Tribunal As Required by Due Process.

The Act is enforced by the Commission, which is given broad authority to serve as a tribunal to hear evidence and to adjudicate various legal and economic disputes between vehicle dealers and manufacturers, including the establishment of new dealerships. The Commission is composed of nine members. Section 84-6604(a) of the Act requires that five of these nine members be existing dealers. Existing dealers have an inherent interest in the outcome of the controversies between dealers and manufacturers. Therefore, a Commission composed of persons who have a natural interest in the outcome of such controversies is not disinterested and impartial within the basic concepts of due process under the United States Constitution.

This Court has spoken on the issues of the necessity for a fair and impartial administrative tribunal on numerous occasions. *See Tumey* v. *Ohio*, 273 U. S. 510 (1927); *Berger* v. *United States*, 225 U. S. 22 (1921); *In re Murchison*, 349 U. S. 133 (1955); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937). The case at bar is particularly controlled by a recent three-judge court case involving the Georgia State Board of Examiners in Optometry which was declared unconstitutional in *Wall* v. *American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D. Ga.), *aff'd mem., sub nom. Hardwick* v. *Wall*, 419 U. S. 888 (1974). The Court pointed out that due process is clearly denied where the members of the Board are representatives of a group that has even an indirect financial interest in the decisions of the Board. *Gibson* v. *Berryhill*, 411 U. S. 564, 578-79 (1973).

The Court below held that the Commission can be presumed to be fair and impartial saying, "It is a common and acceptable practice to appoint members of a profession, business or trade to oversee the practices of that group." 239 Ga. at 375, 237 S.E. 2d at 195. The Court treated the Commission as though it was an ordinary licensing board, and ignored the fact that the Commission serves as a tribunal to decide disputes between dealers and manufacturers, despite the fact that it is by law dominated by existing dealers. This arrangement is neither common nor acceptable under the basic tenets of due process.

In the recent case of *American Motors Sales Corp.* v. *New Motor Vehicle Board*, 69 Cal. App. 3d 983, 138 Cal. Rep. 594 (1977) (Application for hearing denied by the California Supreme Court), the California Court of Appeals held unconstitutional the composition of the California New Motor Vehicle Board, which is similar in function and composition to the Georgia Commission. The

California Commission requires three of the seven members to be dealers. The California court discusses at length the distinction between a mere licensing board where dealers are monitoring dealers, and a board with broad powers to decide economic and judicial disputes between dealers and manufacturers where the economic interests of the two groups are in nowise identical or coextensive. This decision offers persuasive authority for the consideration that such a commission is neither fair nor impartial nor does it comport with the basic tenets of due process.

The Georgia Commission dominated by dealers could in nowise be construed to be disinterested in the outcome of disputes between manufacturers and existing dealers in an issue as to whether or not a new dealer in competition with existing dealers should be added. As was pointed out in the Statement of the Case, in the case at bar three of the members of the Georgia Commission, which ruled that an additional franchise should not be awarded to Trade City, were themselves in direct competition with Trade City within the community or territory which they themselves defined.

Therefore, if this Court grants the petition, it should affirm the judgment of the Supreme Court of Georgia on the additional ground that the Commission is biased in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Respondent GMC prays that the Petition for a writ of certiorari to the Supreme Court of Georgia be denied; and that if the Petition is granted, this Court affirm the judgment below on the grounds argued in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. FELTON JENKINS, JR., attorney for Respondent, General Motors Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of November, 1977, I served three true copies of the foregoing Brief In Opposition upon the Petitioner and all parties, by depositing in a United States mailbox true copies of said Brief, with first-class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

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